

1 ☐ EXPEDITE

2 ☒ Hearing is Set:

3 Date: July 18, 2003

4 Time: 1:30 p.m.

5 Honorable Paula Casey

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7  
8 **STATE OF WASHINGTON**  
**THURSTON COUNTY SUPERIOR COURT**

9 PREMERA, a Washington non-  
10 profit miscellaneous corporation;  
11 and PREMERA BLUE CROSS, a  
12 Washington non-profit corporation,

13 Petitioners,

14 v.

15 MIKE KREIDLER, Insurance  
16 Commissioner for the State of  
17 Washington,

18 Respondent.

NO. 03-2-00112-8

INSURANCE COMMISSIONER'S  
RESPONSE BRIEF

19 Mike Kreidler, the Insurance Commissioner for the State of Washington (the  
20 “Commissioner”) and head of the Office of the Insurance Commissioner (“OIC”), by  
21 and through his attorneys, Christine O. Gregoire, Attorney General, and Christina  
22 Gerstung Beusch, Assistant Attorney General, respectfully files this Response Brief.  
23 A Petition for Judicial Review has been filed by Premera and Premera Blue Cross  
24 (collectively “Premera” or “Petitioner”) seeking this Court’s review of the Third  
Order: Ruling on Premera’s Objections to the Case Management Order (the “Third  
Order”) issued *In the Matter of the Application regarding the Conversion and*

1 *Acquisition of Control of Premera Blue Cross and its Affiliates*, OIC Docket No. G02-  
2 45, which is an adjudicative proceeding being held before the Insurance  
3 Commissioner. The Petition for Judicial Review should be dismissed because the  
4 Third Order is not a final order and, therefore, is not reviewable at this time.  
5 Furthermore, contrary to the arguments of the Petitioner, the Third Order is consistent  
6 with the law, supported by substantial evidence in the record, and within the proper  
7 exercise of the discretion that has been delegated to the Commissioner by the  
8 legislature. Finally, the Petitioner is not entitled to the relief it is seeking.

### 9 **STATEMENT OF FACTS**

#### 10 *The Parties*

11 Premera is a Washington non-profit holding company. (R. 31). It has  
12 numerous affiliates that are domestic companies of either Washington, Alaska, or  
13 Oregon. The domestic insurers that are under the regulatory supervision of the  
14 Washington State Insurance Commissioner are the following: Premera Blue Cross, a  
15 non-profit health care service contractor; LifeWise Health Plan of Washington, a non-  
16 profit health care service contractor; States West Life Insurance Company, a for-profit  
17 company; and MSC Life Insurance Company, a for-profit company. (R. 31).  
18 PREMERA has applied to the Commissioner, through the filing of a Form A, to  
19 convert its non-profit companies to for-profit companies (the “Application” or “Form  
20 A Filing”). (R. 31).

21 The Commissioner is charged with enforcing the provisions of the Insurance  
22 Code. RCW 48.02.060. He is the head of the Office of the Insurance Commissioner  
23 and may appoint such deputies and employ such staff “as he may need for proper  
24 discharge of his duties.” RCW 48.02.090 and .110. The Commissioner may delegate

1 any power or duty vested in him to a deputy or another employee of his office. RCW  
2 48.02.100. With respect to these adjudicative proceedings, the Commissioner is the  
3 presiding hearing officer. (R. 34). Certain employees of the OIC (“OIC Review  
4 Staff” or “OIC Staff”) have been delegated the responsibility to review Premera’s  
5 Application and present their recommendations. (R. 32-33). However, because the  
6 proceedings are adjudicative, there is a separation of functions within the OIC. RCW  
7 34.05.458. (R. 33). The Commissioner and the OIC Review Staff may not have *ex*  
8 *parte* communications regarding the merits of the Form A Filing. RCW 34.05.455,  
9 (R 33).<sup>1</sup>

#### 10 *The Transaction*

11 If the proposed transaction is approved, it will permit Premera and its non-  
12 profit affiliates to convert to for-profit entities. Control of Premera and its affiliates  
13 will transfer to a new for-profit holding company, “New Premera.” (R. 3-4). Because  
14 the transaction results in a change of control of domestic insurers and health care  
15 service contractors, the Holding Company Act, Ch. 48.31B RCW, and the Holding  
16 Company Act for Health Care Service Contractors and Health Maintenance  
17 Organizations, Ch. 48.31C RCW, apply. There is an additional dimension to  
18 Premera’s proposal in that it involves the dissolution of a non-profit entity and the  
19 creation of a for-profit entity. Under the Nonprofit Corporation Act, Ch. 24.03 RCW,

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20 <sup>1</sup> At the time of the oral argument that preceded the issuance of the Third Order,  
21 various groups had petitions to intervene pending before the Commissioner. Although not yet  
22 formal parties to the adjudicative proceeding, the Commissioner allowed their representatives  
23 to argue. The Interveners represented were the Washington Medical Association, Washington  
24 State Hospital Association, Washington Public Hospital Districts, and the Premera Watch  
Coalition. The Coalition, which was then comprised of eleven organizations, is represented by  
Columbia Legal Services. (R. 31). The Interveners have not sought party status in this judicial  
review action.

1 the assets of a dissolving non-profit entity are essentially public assets and must be  
2 used for similar beneficial purposes as approved by the Attorney General. RCW  
3 24.03.225. To comply with this legal requirement, Premera proposes creating a  
4 Foundation Shareholder that would own 100% of the “New Premera’s” stock. (R. 4).  
5 The stock would be sold over a period of time, and the proceeds would be used for the  
6 health care needs of Washington citizens. (R. 3). Presumably, after some fixed  
7 period of time, the “New Premera” would issue additional stock for sale on the public  
8 market as a means of raising capital. (R. 3).

#### 9 *The Regulatory Approval Process*

10 The Commissioner’s approval process is governed by the Holding Company  
11 Acts. Technically, the change in control affecting Premera’s affiliated for-profit life  
12 insurers is governed by Ch. 48.31B RCW, while the change in control affecting  
13 Premera Blue Cross and LifeWise is governed by Ch. 48.31C RCW. The  
14 requirements of the two Acts are essentially the same. For ease of reference and  
15 because the reorganization of the two health care service contractors, particularly the  
16 Blue Cross Plan, is the primary focus of the regulatory review, this brief will refer to  
17 the requirements of Chapter 31C (hereinafter referred to as the “Act”).

18 The first step in seeking approval to acquire control of a domestic insurer is for  
19 the applicant to file a Form A statement with the OIC. RCW 48.31C.030; WAC 284-  
20 18A-910. The information in the Form A must include: the identity of the insurer  
21 being acquired and method of acquisition; the identity and background of the  
22 acquiring party; the identity and background of individuals associated with the  
23 acquiring party; the nature, source, and amount of consideration; future plans of the  
24 health insurer; description of any agreements relating to any stock transactions

1 involving the parties to the acquisition; and financial statements. *Id.* The applicant is  
2 also required to supply information necessary for the Commissioner to “determine  
3 whether the proposed acquisition, if consummated, would have the effect of  
4 substantially lessening competition, or tending to create a monopoly in the health care  
5 coverage business in the state.” RCW 48.31C.030(5)(a)(ii)(A). The Commissioner  
6 and the OIC Staff who have been delegated the responsibility to review the Form A  
7 filing may request additional information from the applicant to complete the Form A.  
8 RCW 48.31C.030(4) and RCW 48.02.100.

9 The Commissioner “may retain at the acquiring party’s expense any attorneys,  
10 actuaries, accountants, and other experts . . . as may be reasonably necessary to assist  
11 the commissioner in reviewing the proposed acquisition of control.” RCW  
12 48.31C.030(5)(b). In this case, several experts in accounting, business valuation, and  
13 insurance regulatory law have been retained to work with the OIC Review Staff in  
14 developing the Staff’s recommendations regarding Premera’s proposal. (R. 33).

15 The Commissioner may approve the Form A statement without a hearing;  
16 although the Commissioner or either party to the transaction may request a hearing.  
17 RCW 48.31C.030(4). However, under no circumstances may the Commissioner  
18 disapprove the transaction without having held a hearing. RCW 48.31C.030(5)(a).  
19 The hearing is conducted in accordance to the rules for adjudicative proceedings in  
20 the Administrative Procedure Act (“APA”), Ch. 34.05 RCW; RCW 48.31C.140. The  
21 Commissioner determined that a hearing was appropriate in this case and stated so in  
22 his First Order: Case Management Order. (R. 32). At the hearing, anyone who has  
23 been granted intervener status by the Commissioner “may examine and cross-examine  
24 witnesses, and offer oral and written arguments, and in connection therewith may

1 conduct discovery proceedings in the same manner as is allowed in the superior court  
2 of this state.” RCW 48.31C.030(4).

3 The Commissioner shall approve the transaction, unless he finds one of the  
4 grounds for disapproval. RCW 48.31C.030(5)(a). Bases for disapproval include the  
5 following: (1) the acquisition would substantially lessen competition or tend to create  
6 a monopoly; (2) the financial condition of the acquiring party is such that might  
7 jeopardize the financial stability of the health carrier, or prejudice the interests of  
8 subscribers; (3) the future plans for the health carrier are unfair and unreasonable to  
9 subscribers and not in the public interest; (4) the competence, experience, or integrity  
10 of management are such that it would not be in the interest of subscribers and the  
11 public to permit the acquisition; or (5) the acquisition is likely to be hazardous or  
12 prejudicial to the insurance-buying public. RCW 48.31C.030(5).

13 As for the timing of the “approval,” the Act provides that the Commissioner  
14 “shall approve . . . an acquisition of control . . . within sixty days after he or she  
15 declares the statement filed under this section to be complete and if a hearing is  
16 requested by the commissioner or either party to the transaction, after holding a public  
17 hearing.” RCW 48.31C.030(4).

1 *Status of the Form A Filing*

2 On November 26, 2002, the Commissioner held a status conference with the  
3 parties and heard oral argument on Premera's objection to the Case Management  
4 Order regarding when the 60-day period referred to in RCW 48.31C.030(4) should  
5 begin to run. (R. 176). At the time of the status conference, as reflected in the  
6 administrative record on file with this Court, the facts regarding the status of  
7 Premera's Form A filing was as follows.

8 Premera submitted its initial Application with the OIC on or about September  
9 17, 2002. (R. 124). On September 27, 2002, Premera supplemented its Application.  
10 (R. 124). On October 7, 2002, OIC Staff sent a deficiency letter to Premera  
11 identifying materials that had been omitted from the filings. (R. 124). On October  
12 22, 2002, the consultants, who were retained pursuant to RCW 48.31C.030(b) and  
13 who are working at the direction of the OIC Review Staff, submitted to Premera an  
14 extensive request for information needed to review Premera's proposal covering  
15 numerous areas, including the following: tax, financial, and actuarial information;  
16 financial projections; claims and underwriting information; reinsurance; investment  
17 operations; personnel and management; policyholder communications; additional  
18 details on the proposed structure of the transaction, post-transaction expectations,  
19 history and background, and tax matters. (R. 72-88, 125). On October 25, 2002,  
20 Premera submitted a second supplemental filing. (R.125). On November 1, 2002, the  
21 consultants delivered a supplemental information request relating to provider  
22 networks, benefit design, and actuarial information. (R. 89-90, 125). On or about  
23 November 11, 2002, Premera submitted a partial response to the information requests  
24 made by the consultants. (R. 125). On November 19, 2002, OIC Staff sent a

1 deficiency letter to Premera identifying additional items that had not been supplied in  
2 its earlier submittals. (R. 125). On November 20, 2002, Premera indicated that it  
3 would make the information requested by the OIC Staff and its consultants available  
4 in a data room. (R. 126).

5 As of the date of the hearing that underlies the Third Order, the OIC Staff  
6 asserted that the Form A Statement was not complete and that there were still  
7 responses to requests for information outstanding. (R. 197). The OIC Staff had also  
8 received communications from its consultants on November 25, 2002, setting forth  
9 items that they had not received, such as certain requested correspondence,  
10 employment and severance agreements, non-redacted board minutes, tax filings, and  
11 current and proposed executive compensation plans. (R. 226). Premera contended at  
12 the hearing that it had submitted all information required under the Act and that its  
13 Application was complete as of its October 25, 2002, filing. (R. 217). Premera  
14 acknowledged that the OIC Staff disagreed with Premera's assessment of the  
15 completeness of the filing. (R. 217).

#### 16 *The Third Order*

17 Based upon the evidence and argument presented at the hearing on November  
18 26, 2002, the Commissioner determined that as a matter of fact there were outstanding  
19 responses due to requests for information, and that the information being requested is  
20 relevant to the Application and the statutory criteria he is required to consider before  
21 approving or disapproving the transaction. (R. 273-74). As such, the Application was  
22 not complete as of November 26, 2002, and under no circumstance had the 60-day  
23 period referred to in RCW 48.31C.030 (4) been triggered.

1 Although not necessary to his finding regarding completeness, the  
2 Commissioner also concluded that his statement in the First Order, indicating that the  
3 60-day period would not be triggered until after the hearing, was consistent with the  
4 law. (R. 274).

## 5 STANDARD OF REVIEW

6 “The burden of demonstrating the invalidity of agency action is on the party  
7 asserting the invalidity.” RCW 34.05.570(1)(a). The court reviews the agency action  
8 to determine if it was valid at the time it was taken, confining itself to the facts in the  
9 record. RCW 34.05.570(1)(b) and RCW 34.05.476(3) and .558. “The court shall  
10 grant relief only if it determines that a person seeking judicial relief has been  
11 substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). “In  
12 reviewing matters within agency discretion, the court shall limit its function to  
13 assuring that the agency has exercised its discretion in accordance with the law, and  
14 shall not itself undertake to exercise the discretion that the legislature has placed in  
15 the agency.” RCW 34.05.574(1). The standards for reviewing an agency order in an  
16 adjudicative proceeding are generally set forth in RCW 34.05.570(3).

17 In reviewing an alleged error of law, the court engages in a de novo review of  
18 the agency’s legal conclusions. *Franklin Cy. Sheriff’s Office v. Sellers*, 97 Wn.2d  
19 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). However, when  
20 an agency is interpreting the law it administers or its own rules, a court must give  
21 substantial weight to the agency’s interpretation. *Renton Educ. Ass’n v. Public Empl.*  
22 *Relations Comm’n*, 101 Wn.2d 435, 443, 680 P.2d 40 (1984); *Dana’s Housekeeping*  
23 *v. Dep’t of Labor & Indus.*, 76 Wn. App.600, 886 P.2d 1147, *review denied*, 127  
24 Wn.2d 1007 (1985); *Tapper v. Employment Security Dep’t*, 122 Wn.2d 397, 403, 858

1 P.2d 494 (1993). This is particularly important when the agency has expertise in the  
2 subject matter. *Inland Empire Distrib. Sys., Inc. v. Utilities & Transp. Comm’n*, 112  
3 Wn.2d 278, 770 P.2d 624 (1989); *Schuh v. Dep’t of Ecology*, 100 Wn.2d 180, 187,  
4 667 P.2d 64 (1983).

5 Findings of fact are reviewed under the substantial evidence standard. RCW  
6 34.05.570(3)(e). An agency finding shall be upheld if it is supported by “evidence  
7 that is substantial when viewed in light of the whole record before the court.” RCW  
8 34.05.570(3)(e). The evidence must simply be of a sufficient quantum to persuade a  
9 fair minded person of the truth of a declared premise. *See, e.g., Heinmiller v. Dep’t of*  
10 *Health*, 127 Wn.2d 595, 903 P.2d 433, *cert. denied*, 518 U.S. 1006 (1995); *In re:*  
11 *Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The substantial  
12 evidence test is highly deferential to the agency fact finder. *ARCO Products Co. v.*  
13 *Utilities & Trans. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The  
14 reviewing court will not weigh the evidence or substitute its view of the facts for that  
15 of the agency, even if the court would have made a different finding from a reading of  
16 the record. *See, e.g., Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929  
17 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997); *Nghiem v. State*, 73 Wn. App. 405,  
18 869 P.2d 1086 (1994).

19 The arbitrary and capricious test applies to the exercise of agency discretion.  
20 *Trucano v. Dep’t of Labor & Indus.*, 36 Wn. App. 758, 677 P.2d 770 (1984). This is a  
21 very narrow standard and the one asserting it “must carry a heavy burden.” *Pierce*  
22 *Cy. Sheriff v. Civil Service Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). To be  
23 overturned, a discretionary decision must be manifestly unreasonable. *ITT Rayonier,*  
24 *Inc. v. Dalman*, 67 Wn. App. 504, 837 P.2d 647, *aff’d*, 122 Wn.2d 801, 863 P.2d 64

1 (1993). There must be a clear showing of abuse. *ARCO Products Co.*, 125 Wn.2d  
2 805, 888 P.2d 728 (1995). Where there is room for two opinions, action is not  
3 arbitrary or capricious when exercised honestly upon due consideration, even though  
4 one may believe the conclusion was erroneous. *See, e.g., Heinmiller v. Dep't of*  
5 *Health*, 127 Wn.2d 595, 903 P.2d 433 (1995); *Patterson v. Superintendent of Public*  
6 *Instruction*, 76 Wn. App. 666, 887 P.2d 411, *review denied*, 126 Wn.2d 1018 (1994).

## 7 **ARGUMENT**

### 8 **I. The Petition For Judicial Review Of The Third Order Should Be** 9 **Dismissed Because The Third Order Is Not A Final Order Subject To** 10 **Review Under The Administrative Procedure Act.**

11 Judicial review of agency orders in adjudicative proceedings is permitted under  
12 the Administrative Procedure Act ("APA"). RCW 34.05.570(3). However, an  
13 "order" that is subject to review is one that "*finally* determines the legal rights, duties,  
14 privileges, immunities, or other legal interests of a specific person or persons." RCW  
15 34.05.010(11)(a) (emphasis added). To be reviewable, an order must "impose an  
16 obligation, deny a right, or fix some legal relationship as a consummation of the  
17 administrative process." *Dep't of Ecology v. City of Kirkland*, 84 Wn.2d 25, 30, 534  
18 P.2d 1181, 1184 (1974) quoting *Chicago & Southern Airlines, Inc. v. Waterman S.S.*  
19 *Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431 (1948). A state agency's refusal to issue a  
20 license based on an assessment of the qualifications of the applicant is a final order,  
21 because it is a "denial of a right . . . and the fixing of a legal relationship as a  
22 consummation of the administrative process." *Bock v. State Board of Pilotage*  
23 *Comm'rs*, 91 Wn.2d 94, 99, 586 P.2d 1173, 1176 (1978). In contrast, an  
24

1 “interlocutory administrative order” that is “no more than a preliminary step in the  
2 process” is not a final decision subject to judicial review. *Renton Educ. Ass’n v.*  
3 *Public Empl. Relations Ass’n*, 24 Wn. App. 476, 479-80, 603 P.2d 1271, 1273 (1979),  
4 *review denied*, 93 Wn.2d 1025 (1980). The policy behind the final order rule is to  
5 avoid piecemeal litigation. *Id.* In the absence of the final order rule, the Superior  
6 Court would be required to entertain appeals from every ruling made by an agency  
7 governing the timing and procedures for an adjudicative hearing before a decision on  
8 the merits had been reached.

10 Premera is asking the Court to inject itself into the preliminary stages of an  
11 administrative adjudication and issue a ruling on whether the filings submitted by  
12 Premera constitute a complete Form A. The assessment of the OIC Review Staff and  
13 a decision by the Commissioner that additional information is required from Premera  
14 does not deny Premera any right, impose any obligation, or fix any legal relationship.  
15 The Commissioner did not refuse to exercise discretion or refuse to perform a duty.  
16 Such refusal possibly could have been a basis for review under RCW 34.05.570(4)(b),  
17 but Premera is not seeking judicial review under that provision of the APA. The  
18 Third Order is an interlocutory order of the Commissioner; therefore this Court should  
19 dismiss Premera’s Petition for Judicial Review as being improvidently brought.

22 **II. The Insurance Commissioner’s Determination That Premera’s Form A**  
23 **Filing Was Not Complete Is Consistent With The Law, A Proper**  
24 **Exercise Of His Discretion, And Supported By Substantial Evidence In**  
**The Record.**

1       Premera's assertion that its Form A statement was complete on October 25,  
2 2002, when presumably it made its last unilateral filing with the OIC, is wrong as a  
3 matter law. The Holding Company Act clearly places the authority and the discretion  
4 in the Commissioner to declare when an insurer's Form A statement is complete.  
5 RCW 48.31C.030(4). The Commissioner, or the staff to whom he has delegated the  
6 responsibility, is specifically authorized to obtain additional information from the  
7 applicant in order to ensure that the Form A is complete. *Id.* While Premera  
8 acknowledges that it has some obligation to provide additional information if  
9 requested, it suggests that the Commissioner and the OIC staff are relegated to  
10 acquiring that information through "discovery." Once again, Premera's position does  
11 not comport with the Act. In the first instance, Chapter 31C does not mandate that a  
12 hearing be held. In the absence of an adjudicative process, there is no forum to  
13 conduct discovery. Additionally, while the OIC Review Staff is not precluded from  
14 also using traditional civil discovery tools in those cases where a hearing is held, the  
15 Act does not limit or nullify the express authority to simply request additional  
16 information. RCW 48.31C.030(4).

19       Premera also contends that it satisfies the obligation to file a "complete" Form  
20 A, if it simply submits information that it deems to be adequate as to each of the  
21 statutory items, RCW 48.31C.030(2). This "take it or leave it" approach once again is  
22 contrary to the Act. The Commissioner, or the staff to whom he delegates the  
23 responsibility, is given express authority to ask for information required to make the  
24

1 filing complete; and it is the Commissioner, not the insurer, who is vested with  
2 the discretion to determine when the filing is complete. RCW 48.31C.030(4).  
3 Obviously, the complexity and the potential impact of the transaction may dictate the  
4 extent of the information that the Commissioner will require to ensure that the filing  
5 adequately addresses the statutory criteria that he must ultimately consider. RCW  
6 48.31C.030(5)(a).  
7

8 As more fully described in the Statement of Facts, there is substantial evidence  
9 in the administrative record that on November 26, 2002, there were numerous and  
10 significant outstanding requests for information that had not yet been provided.  
11 Indeed, Premera does not seriously quarrel with that fact. Furthermore, contrary to  
12 Premera's assertions, the requests were in writing, specific, and detailed. (R. 72-93).  
13 Premera seems to insinuate that because the information requests came from the OIC  
14 Review Staff and the consultants assisting them and not directly from the  
15 Commissioner, the Third Order is somehow deficient. In the normal course of agency  
16 business, it is expected that the Commissioner would delegate such responsibilities to  
17 appropriate staff. RCW 48.02.100. The lead staff person on this review is a deputy  
18 insurance commissioner. (R. 39). More significantly is the fact that this review is  
19 occurring in the context of an administrative proceeding where the Commissioner is  
20 the presiding hearing officer. The review function of the staff and the decisionmaking  
21 function of the Commissioner must be separate. RCW 34.05.458.  
22  
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1 Based upon the evidence presented at the hearing, where all the parties were  
2 present, the Commissioner properly concluded that the filing was not complete. As  
3 Premera has failed to meet its burden that it had a complete Form A filed with the  
4 OIC, this Court should affirm the Commissioner's Third Order.

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6 **III. In Construing The Holding Company Act To Allow The Time Period**  
7 **Within Which A Decision On Premera's Proposed Transaction To**  
8 **Begin To Run After The Hearing, The Commissioner Acted**  
9 **Consistently With The Law And Within The Bounds Of His Discretion.**

10 The Court need not reach the decision of how the Act should be interpreted  
11 regarding the timing of a decision on Premera's Application. The fact is that Premera  
12 has not satisfied its burden of proving that its filing is complete. Even under Premera's  
13 interpretation of the law, the time in which a decision should be made does not begin to  
14 run until after the Application is complete. As discussed in Section II, there is  
15 substantial evidence in the record that Premera had not submitted all of the information  
16 requested by the OIC Staff and its consultants and that the information requests were in  
17 writing and specific. The requirement of a complete filing not having been met, it is  
18 not necessary for the Court to opine on when the Commissioner should render a  
19 decision. However, if the Court chooses to address the issue of when the  
20 Commissioner should render a decision in this matter, it should affirm the  
21 Commissioner's conclusion that the 60-day period referred to in the Act should not  
22 begin to run until after the hearing. The Commissioner's conclusion is correct for  
23 several reasons.

1 Chapter 31C RCW, which applies to HMOs and health carriers, provides that  
2 “the commissioner shall approve an . . . acquisition of control within 60 days after he or  
3 she declares the statement . . . to be complete and if a hearing is requested by the  
4 commissioner or either party to the transaction, after holding a public hearing.” RCW  
5 48.31C.030(4); *see also* RCW 48.31B.015(4)(b). The statute does not dictate at what  
6 point in the process a declaration of completeness must occur. Even if the declaration  
7 of completeness is the single event that triggers the 60-day time period, there is nothing  
8 in the statute that mandates that the Commissioner must make that declaration at some  
9 point prior to the hearing.<sup>2</sup> The decision of when to declare the filing complete is  
10 within the discretion of the Commissioner. In this case for example, the Commissioner  
11 has retained experts who will be providing reports that will be shared with Premera before  
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21 <sup>2</sup> Premera cites prior OIC orders resulting from hearings in which the applicant’s Form  
22 A had been declared complete prior to the hearing. Although declaring the Form As complete  
23 may have been appropriate in those cases, that result is not mandated in this case. Even if there  
24 were inconsistency between the Third Order and prior orders, the legislature did not provide in  
the APA that inconsistency with other agency orders is a ground for setting aside or remanding  
an agency decision. *Compare* SSB 5090, § 80 (1987) with RCW 34.05.570(3).

1 the formal adjudication. (R. 221-22). Premera has reserved the right to submit expert  
2 reports, but will not submit them until after it receives the OIC's reports and not until  
3 the time for filing pre-filed testimony. (R. 221-23). It is within the Commissioner's  
4 discretion under these facts to determine that the filing will not be considered complete  
5 without the expert information that Premera has represented it will be providing.  
6

7       Additionally, the language of the Act can reasonably be interpreted to require  
8 both a declaration of completeness and a hearing before the 60-day period begins to  
9 run. Under Premera's scenario, it deems the Form A filing complete when the  
10 applicant has submitted the information it believes is adequate to address the items in  
11 the Form A. From that point the Commissioner has sixty days to retain experts, rule on  
12 the status of interveners, allow for discovery by the parties, hold the hearing, and issue  
13 a ruling. Under Premera's approach, all of the information that the OIC consultants are  
14 currently reviewing may still be made available, but the 60-day clock would be  
15 running. The ability of the OIC Staff to adequately review the Application with the  
16 consultants would be restricted by the applicant's cooperation in producing the  
17 information promptly and completely. Based on the administrative record, it took close  
18 to a month after Premera's October 25, 2002, filing date, for Premera to make the  
19 documents requested available in a data room. (R. 125-26).  
20  
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22       Of course, when there are interveners, there are additional issues regarding  
23 accessibility to documents. (R. 137). Under Premera's interpretation, all issues  
24 regarding confidentiality and the need for protective orders would have to be resolved

1 and discovery concluded during this same 60-day window. In order to take into  
2 account all of the interests the legislature recognized in an adjudicative proceeding  
3 under the Holding Company Act and to apply the law in a manner that will not result  
4 in absurd results, the time for a decision to be rendered by the Commissioner should  
5 run after the hearing, not before or during.<sup>3</sup>  
6

7 Finally, the timeframes set forth in the Holding Company Act for deciding on  
8 the completeness of a Statement and whether to approve or disapprove a transaction  
9 are directory, not mandatory. While the time period discussed in *Erection Co. v.*  
10 *Labor & Industries*, 121 Wn.2d 513, 852 P.2d 288 (1993) was jurisdictional and,  
11 therefore, mandatory, the word “shall” in RCW 48.31B.015 and 48.31C.030 regarding  
12 the 60-day decision period should be construed as directory and permissive. The plain  
13 language of the statutes does not create a jurisdictional requirement. Moreover, where  
14 important public rights and interests are involved, such as in this case, courts will not  
15 construe a statutory time frame as a mandatory requirement. *See, e.g., Brock v. CY*,  
16  
17

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18 <sup>3</sup> Premera refers to the NAIC Model Rules to draw support for its position. *See* NAIC  
19 440-1, attached hereto. However, a comparison shows that this state did not accept most  
20 aspects of the Model regarding the time to make a decision on a Form A. The Model Rule  
21 specifically states that a public hearing will be held within thirty days after a Form A is filed.  
22 Washington law did not set a hearing date based on the date of filing. Indeed, there is no  
23 specific time identified in the statute in which the hearing must be held. Additionally,  
24 Washington law clearly gives the Commissioner discretion in determining the adequacy of the  
filing, which the Model Law does not expressly do. Finally, both the Model and this state’s  
law contemplate that a decision will be rendered after a hearing. However, in the Model the  
date is determined by the date the transaction is proposed to take effect. In sum, there are  
important differences between the Model and Washington law on the issue of timing, that  
Premera’s emphasis on the Model is misplaced.

1 476 U.S. 253 (1986); *Nichel v. Lancaster*, 97 Wn.2d 620, 647 P.2d 1021 (1982);  
2 *State v. Bryan*, 93 Wn.2d 177, 606 P.2d 1228 (1980); *State v. Miller*, 32 Wn.2d 149,  
3 201 P.2d 136 (1948).

4 If the Court addresses the issue of the timing of the Commissioner's decision on  
5 Premera's proposal to convert to a for-profit insurer, it should affirm the  
6 Commissioner's conclusion that he has sixty days from the conclusion of the hearing  
7 to render a decision.  
8

9 **IV. The Relief Requested By Premera From The Commissioner's**  
10 **Third Order Cannot Be Granted Under The Administrative**  
**Procedure Act.**

11 The relief that Premera seeks is impermissible under the APA and, therefore,  
12 cannot be granted by the Court. Premera is asking that this Court declare that the  
13 Form A is deemed complete by operation of law and instruct the Commissioner to  
14 immediately set a date for a hearing, or in the alternative, remand the matter to the  
15 Commissioner with instructions to declare the Form A complete or identify with  
16 specificity what additional information is required to make it complete. Petitioner's  
17 Opening Brief at 23. The APA limits the type of relief and the conditions under  
18 which a court may grant relief when an agency order is being reviewed under RCW  
19 34.05.570(3). Premera has not met its burden of establishing it is entitled to relief.  
20

21 When awarding relief, other than affirming the action, the restrictions of RCW  
22 34.05.570(1)(d) must be applied. This provision requires that relief can only be  
23 granted if the party seeking relief has been "substantially prejudiced." *See Skold v.*  
24

1 *Johnson*, 29 Wn. App. 541, 552, 630 P.2d 456, *review denied*, 96 Wn.2d 1003 (1981).

2 Premera has not satisfied its burden of showing that it has been substantially  
3 prejudiced. There is substantial evidence that at the time of the hearing on November  
4 26, 2002, Premera had not yet provided the information that had been specifically  
5 requested by the OIC Staff and its consultants. *See* Section II. Even if one were to  
6 accept Premera's interpretation of the law as to the timing of the hearing, Premera did  
7 not prove in the first instance that it had satisfied the specific requests for additional  
8 information required to make its filing complete. Having failed to prove it had a  
9 filing that the Commissioner could declare complete, it has not suffered substantial  
10 prejudice by not having a hearing scheduled. In addition, there are no facts in the  
11 record to support any claim that Premera has been substantially prejudiced by not  
12 having the hearing scheduled in the time frame Premera requested. In contrast, to  
13 permit Premera to control the timing of the hearing by allowing it to dictate when the  
14 filing is complete would be prejudicial to the Staff's review, the ability of the  
15 Commissioner ultimately to make a fully informed and fair decision, and the interests  
16 of the interveners and the public. (R. 275).

19 RCW 34.05.574(1) and (2) set forth the relief a court can award in the three  
20 types of review conducted under RCW 34.05.570. As stated above, the prerequisite  
21 to any relief, other than affirming the agency action, is that the party seeking relief  
22 has been substantially prejudiced. Once that prerequisite is established, the type of  
23  
24

1 available relief is dictated by the type of review, which in this case is review of an  
2 agency order pursuant to RCW 34.05.570(3).

3         Premera's request that this Court order the Commissioner to set a date for a  
4 hearing is mandamus-like relief available under a petition brought pursuant to RCW  
5 34.05.570(4)(b), which Premera has not done. It is not the type of relief available in  
6 reviewing an agency order under RCW 34.05.570(3). Premera is also asking this  
7 Court to grant declaratory relief by having the Court declare that the Form A is  
8 deemed complete by operation of law. Declaratory relief is specifically referred to in  
9 RCW 34.05.570(2) where the validity of an agency rule is being challenged; however  
10 it is not an appropriate form of relief in reviewing an adjudicative order. In reviewing  
11 an adjudicative order, the Court cannot modify agency action or simply take the  
12 action itself. *Skold*, 29 Wn. App. at 549, 630 P.2d 456.

13         As another alternative, Premera requests that the Court remand the matter to  
14 the Commissioner with instructions to either declare the filing complete or identify  
15 with specificity the additional information required to make it complete.  
16 Remand is an available remedy under RCW 34.05.574(1) where a court is not  
17 affirming the agency action. However, a remand with instructions on which portions  
18 of an order to change and how to change them is considered an impermissible  
19 modification of the court. *See Skold*, 29 Wn. App. at 549, 630 P.2d 456. This  
20 limitation on the reviewing court's power is a recognition of the division of authority  
21 between the agency and the court.  
22  
23  
24

1 Because Premera has not established that it has been substantially prejudiced  
2 by the Third Order, it is not entitled to relief under the Administrative Procedure Act.  
3 Even if it could meet the prerequisite of proving substantial prejudice, the relief it has  
4 requested is not available on a review of an adjudicative order.  
5

### 6 CONCLUSION

7 WHEREFORE, the Insurance Commissioner respectfully requests that  
8 Premera's Petition for Review be dismissed, or in the alternative that the Third Order:  
9 Ruling on Premera's Objections to the Case Management Order be affirmed.

10 DATED this \_\_\_\_\_ day of June, 2003.

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